JHP & Associates, LLC d/b/a Metta Electric *and* Local No. 1, International Brotherhood of Electrical Workers, AFL–CIO. Cases 14–CA–28042 and 14–CA–28179

May 16, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On July 13, 2005, Administrative Law Judge James L. Rose issued the attached decision. The Respondent and General Counsel filed exceptions and supporting briefs. The Charging Party filed cross-exceptions and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found a broad order warranted under the "proclivity" prong of *Hickmott Foods*, 242 NLRB 1357 (1979), based solely on this being the second case in which the Respondent has been found to have violated the Act. See *Metta Electric*, 338 NLRB 1059 (2003) (*Metta I*), enfd. 360 F.3d 904 (8th Cir. 2004). We[3] disagree. As the Board recently stated, "[a] broad order is certainly not warranted in every instance of recidivist misconduct." *Postal Service*, 345 NLRB No. 25, slip op. at 2 (2005), enfd. as modified 477 F.3d 263 (5th Cir. 2007). In finding a broad order unwarranted here, we note the extent to which the Board's narrow order in *Metta I* succeeded in restraining the Respondent from committing recidivist violations. The Respondent was found in *Metta I* to have violated Section 8(a)(1), (3), and (5) in numerous ways that have not been repeated here. The narrowing scope of violations from *Metta I* to this case militates against a finding that the Respondent has a proclivity to violate the Act or a general disregard for employees' fundamental statutory rights. We also note that the Union's information requests have not pertained to grievance investigations, where the withholding of information has the potential to hide other misconduct; and there is no background of continuing and widespread violations of a like kind. Cf. *Postal Service*, supra, slip op. at 2–3 (imposing broad order where, inter alia, the union's requests pertained to grievance investigations, and there was a background of two decades of widespread and repeated information-request violations). In sum, we find the Respondent's recidivism, standing alone, insufficient to warrant a broad order under the *Hickmott* standard.[4]

2. The judge recommended that the Union's certification year be extended 12 months. We[5] agree. In *Metta I*, supra, the Board extended the certification year for 12 months. After the Eighth Circuit enforced the Board's order, the Union requested certain information. The Respondent refused the request and refused to bargain. Some 8 months later, the Respondent furnished some, but not all, of the requested information and bargained with the Union three times over the course of 2 months, following which the Respondent invalidly declared impasse and refused to bargain any further. Thus, although some bargaining took place, the Union was bargaining without relevant requested information. In sum, since the Board's order in *Metta I* mandating, inter alia, 12 additional months of bargaining, the Union has yet to secure a *single minute* of bargaining uncompromised by the Respondent's unlawful conduct.

Our colleague would extend the certification year for 6 months rather than 12 months. He would shorten the *Mar-Jac* extension out of concern that 7 years have

[1] In finding that the Respondent unlawfully refused to meet and bargain with the Union, the judge found, inter alia, that the parties had not reached a valid impasse in negotiations privileging the Respondent's refusal. We agree that the parties had not reached a valid impasse, both for the reasons stated by the judge and because the Respondent's unlawful failure to furnish requested relevant information precluded the reaching of a lawful impasse. See *United States Testing Co.*, 324 NLRB 854, 860 (1997), enfd. 160 F.3d 14 (D.C. Cir. 1998); *Decker Coal Co.*, 301 NLRB 729, 740 (1991); *Dependable Building Maintenance Co.*, 274 NLRB 216 (1985).

Member Schaumber agrees that the evidence is insufficient to establish a valid impasse and finds it unnecessary to rely on the failure to provide relevant information. While there may be merit to the Respondent's contention that the Union had no intention of agreeing to anything other than its area agreement with National Electrical Contractors Association (NECA), the record here fails to establish that fact.

[2] For the reasons explained below, we will substitute a narrow cease-and-desist order for the judge's recommended broad order. We will also modify the recommended Order to conform to the remedy section of the judge's decision and to the Board's standard remedial language, and in accordance with *Excel Container*, 325 NLRB 17 (1997); and we will substitute a new notice in conformity with the Order as modified.

[3] I.e., Member Schaumber and Member Kirsanow.

[4] Member Schaumber adheres to his view in *Postal Service*, supra, that a broad order was unwarranted in that case. He agrees, however, that this case presents even weaker facts upon which to issue a broad order than did *Postal Service*.

In contrast to her colleagues, Member Liebman would grant a broad order, based on the Respondent's many violations of the Act in a relatively short period of time. She would also order the Respondent to read to its employees the Notice to Employees, as requested by the General Counsel.

[5] I.e., Member Liebman and Member Kirsanow.

passed since the Union was certified; and the Respondent's employees cannot, if they so desire, oust the Union during the *Mar-Jac* extension period. That is true, and we are sympathetic to our colleague's concern. It is also true, however, that the Respondent's employees selected the Union as their collective-bargaining representative. Since their choice was certified in February 2000, the Respondent's bargaining has amounted to the following: in 2000, two sessions, lasting a total of "at most" three-and-a-half hours, almost all of which was spent "discussing the Union's patently relevant information requests," *Metta I*, supra, 338 NLRB at 1066; and in 2005, 3 sessions, during all of which the Union bargained in partial darkness, i.e., with some but not all of the relevant information it had asked for.

Our colleague appears to defend a shorter 6-month extension based on the Union's insistence that the Respondent accept the area agreement with the National Electrical Contractors Association (NECA). On the other hand, he also says that 6 months is sufficient "for the parties to reach an agreement if, in fact, the Union is prepared to do more than simply insist that the Respondent accept the area agreement with NECA." Thus, in his view, a 6-month extension is warranted regardless of whether the Union adheres to its position or moves away from it. In other words, the Union's bargaining stance is irrelevant to the *Mar-Jac* extension issue. We agree. Our colleague's real concern appears to be that the parties may be close to impasse. That may well be, but it is unrelated to the *Mar-Jac* issue.

Moreover, under the particular circumstances presented here, to order less than a full 12-month extension would be especially problematic. The Board ordered a 12-month *Mar-Jac* extension in *Metta I*, the Eighth Circuit enforced that order, and the Respondent refused to comply. To reward the Respondent's defiance of our court-enforced 12-month extension in *Metta I* by shortening the extension to 6 months now would undermine our own authority, show disrespect to the court of appeals, and encourage further defiance of *Mar-Jac* orders in future cases.[6]

[6] Unlike his colleagues, Member Schaumber would extend the certification year for 6 months, rather than the full year recommended by the judge pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962). He observes that the duration of the extension of the certification year depends on the circumstances of the individual case. In fashioning an appropriate remedy, the Board's task is to provide "a reasonable period of time" for bargaining "without unduly saddling the employees with a bargaining representative that they may no longer wish to have represent them." *Wells Fargo Armored Services Corp*., 322 NLRB 616, 617 (1996) (internal quotations omitted). Here, several factors militate against a full-year extension. First, the unlawful conduct consisted of information request violations and a refusal to meet with the Union at reasonable times for bargaining, not a withdrawal of recognition or coercive conduct directed to employees. Second, more than 7 years have passed since the certification. During an extension of the certification year, employees are unable to exercise their Sec. 7 right to oust or change their representative.

Although Member Schaumber recognizes his colleagues' position that the parties only bargained three times before the Respondent declared impasse he would emphasize that, during those negotiation sessions, the Union was unwilling to back down from its objective that the Respondent accept the Union's area agreement with National Electrical Contractors Association (NECA). During these three negotiation sessions, the Union presented no real counterproposals. Indeed, the Union's counterproposals included a proposed interim agreement which simply extended the time until the Respondent would have to become a member of NECA or an agreement which would have been more costly to the Respondent than the NECA agreement. Under these circumstances, Member Schaumber concludes that a 6-month extension of the certification year is appropriate. That is a sufficient time for the parties to reach an agreement if, in fact, the Union is prepared to do more than simply insist that the Respondent accept the area agreement with NECA.

ORDER

The National Labor Relations Board orders that the Respondent, JHP & Associates, LLC d/b/a Metta Electric, St. Charles, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively and in good faith with the Union concerning wages, hours, and other terms and conditions of employment.

(b) Refusing to furnish, and delaying in furnishing, requested information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All journeymen and apprentice electricians employed by Respondent from its St. Charles, Missouri facility, EXCLUDING all office clerical and professional employees, guards and supervisors as defined in the Act.

The Union's certification is extended 12 months from the date the Respondent begins to comply with this Order.

(b) Provide the Union with the relevant information it requested in letters dated April 26, 2004, May 10, 2004,

January 12, 2005, February 3, 2005, and February 28, 2005, updated to the present.

(c) Within 14 days after service by the Region, post at its facility in St. Charles, Missouri, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 16, 2007

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively and in good faith with Local No. 1, International Brotherhood of Electrical Workers, AFL–CIO (the Union), concerning wages, hours, and other terms and conditions of employment.

WE WILL NOT refuse to furnish, or delay in furnishing, requested information that is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, upon request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All journeymen and apprentice electricians employed by us from our St. Charles, Missouri facility, EXCLUDING all office clerical and professional employees, guards and supervisors as defined in the Act.

WE WILL provide the Union with the relevant information it requested, updated to the present.

JHP & ASSOCIATES, LLC D/B/A METTA ELECTRIC

Paula B. Givens, Esq., for the General Counsel.
Lawrence P. Kaplan, Esq., Saint Louis, Missouri, for the Respondent.
Christopher N. Grant, Esq., of Saint Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This is an ongoing dispute in which the Respondent has repeatedly refused to honor it obligations under the National Labor Relations Act (the Act). Following an initial Board decision,[1] enforced by the

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *Metta Electric,* 338 NLRB 1059 (2003).

Eighth Circuit Court of Appeals,[2] the Respondent has allegedly continued to engage practices violating Section 8(a)(5) of the Act (refusing to furnish requested information and refusing to meet and bargain), which allegations were tried before me at Saint Louis, Missouri, on May 25, 2005.

The Respondent generally denied the substantive allegations in the complaint, and affirmatively contends that the Union never intended to reach an agreement but is trying to force the Respondent out of business.

The record as a whole, including my observation of the witness, briefs and arguments of counsel, I hereby make the following

I. JURISDICTION

The Respondent is a Missouri limited liability company with an office and place of business in St. Charles, Missouri, from which it has been engaged in the building and construction industry as an electrical contractor. In the course and conduct of this business, it annually receives directly from points outside the State of Missouri, goods, products, and materials valued in excess of $50,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6), and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, Local No. 1, International Brotherhood of Electrical Workers, AFL–CIO (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts in Brief.

On February 28, 2000, the Union was certified to represent a unit of the Respondent's electricians. The Respondent then made certain unilateral changes in employee working conditions and on March 15, 2000, the unit employees went on strike. The Respondent hired replacements and the strikers were subsequently hired by other employers whose employees are represented by the Union. Thereafter, the Union made certain requests for information, including the names, addresses and telephone numbers of all strike replacements. The Respondent refused to submit the requested information, which along with the unilateral changes in working conditions other activity alleged violative of the Act led to the initial round of litigation. As noted above, these allegations were tried before an Administrative Law Judge, whose findings were affirmed by the Board. The Eight Circuit granted enforcement (except for the addresses of the strike replacements), following which the Union again requested certain information and sought to bargain with the Respondent.

Counsel for the Respondent initially refused to bargain, stating in a letter dated May 27, 2004, to the Board's Regional Office that "It is Metta's position that Local 1 does not intend to engage in 'genuine bargaining' as such Metta is refusing to bargain on the same grounds as Local 1 has refused in those other instances." When the General Counsel's litigation division was considering whether to seek contempt in the Eighth Circuit, Counsel again wrote, in part, "The Employer has not furnished information concerning the identity of its employees, their wage rates and other such information because it is the Employer's well founded belief that the Union does not wish to engage in 'genuine bargaining' and rather seeks the information only to disrupt and destroy the Employer."

Subsequent to the Board's petition for contempt (which was ultimately denied), the Respondent agreed to meet and did in fact furnish some but not all of the requested information. The parties then had three negotiation sessions in February and March 2005. In sum, the Union proposed its area agreement with National Electrical Contractors Association (NECA), which the Respondent rejected on grounds that it did not want NECA as its bargaining agent. The Respondent also rejected a proposed interim agreement, which Union negotiators stated could run from 12 to 18 months, and, as Larry Palazzolo testified, would be "a bridge between where they are now and the IBEW/NECA agreement." And finally, the Respondent rejected the Union's proposal which deleted NECA but which, according to Palazzolo, the Union's Director of Organizing, contained changes that made it more costly than the first proposal. He testified "that many of these changes were substantially more than were in the first proposal" because "if we were deleting NECA and the opportunities to bargain, we wanted something in return. We feel that is (deleting NECA) is a very costly concession and we wanted something in return."

After the third meeting, Lawrence Kaplan, Counsel for the Respondent, suggested the parties were at an impasse, but that if the Union wanted to negotiate further, he was available by phone. The Union rejected phone negotiations.

B. Analysis and Concluding Findings.

The Respondent's principal defense is Counsel's assertion that the Union has no intention of agreeing to anything other than its area contract with NECA. Given the "Favored Nations" clause in the area agreement, for the Union to agree with the Respondent for terms and conditions of employment lesser than those in the area agreement would allow all the other employers to invoke those lesser terms. It therefore follows that the Union would not enter into such an agreement with the Respondent. Counsel has a point and may even be correct; however, other than his opinion, there is no evidence in the record on which to base a finding that the Union does not in fact seek to negotiate an individual contract with the Respondent. And, of course, the "Favored Nations" clause is subject to interpretation should in fact the Union agree with the Respondent to something other than the terms of the area agreement. Counsel made the same contention in the initial case, which was summarily rejected by Judge Clark on grounds that Counsel there, as here, cited no case authority nor evidence to support his claim. Accordingly, I conclude that the Respondent is not excused from its obligations under the Act to bargain in good faith with the representative of its employees.

1. Refusal to furnish information

In paragraphs 6, 7, and 8 of the complaint it is alleged that on various dates from April 26, 2004, to February 3, 2005, the Respondent refused to furnish, or delayed in furnishing, infor-

[2] *Metta Electric v. NLRB,* 360 F3d 904 (8th Cir. 2004).

mation concerning the names of bargaining unit employees and their respective wages and other benefits. The first category of information requested by the Union on April 26, 2004 is: the names of all bargaining unit employees from 2000 to the present, their dates of employment and reasons for any terminations, current wage rates for all bargaining unit employees on prevailing and nonprevailing wage jobs and all wage rates from 2000, all prevailing wage reports from 2000, copies of all employee benefit plans, copies of any vacation, holiday, sick days or cellular phone plans and accumulated vacation, holiday, or sick days for each unit employee; and copies of personal policies and employee handbooks in effect from 2000 to the present. Excluded was all such information already submitted.

Additionally, by letter of February 3, 2005, the Union requested information relating to current employees including for each: name, hire date, classification, wage rate, amount of PTO accrued yearly and hourly cost to the Respondent, medical insurance paid by the Respondent, any retirement premiums paid by the Respondent and the hourly cost and holiday pay costs. The Union further requested information concerning each apprentice, including the particular program and program standards, pay scale progression, and hours needed for each progression and the hours worked by each apprentice and the Respondent's costs.

All this requested information relates to the wages, hours, and other terms and conditions of the Respondent's employees. The information is therefore potentially helpful to the Union in forming bargaining proposals and determining whether to accept or reject proposals from the Respondent. The information is necessary and material to the Union in its capacity as the employees' bargaining representative.

In *NLRB vs. Acme Industrial,* 385 U.S. 432 (1967), the Supreme Court affirmed the Board's general holding that a union is entitled to information necessary to perform its duty as the bargaining representative, and specifically information which might tend to prove the viability of grievances—that is information which is potentially relevant to issues being grieved. Subsequently, the Board has applied the general holding of Acme to information requested by a union for use in collective bargaining. E.g., *Gorham House, Inc.,* 332 NLRB 1556 (2000).

The Respondent recognizes its general obligation to furnish material information on request, but justifies its refusal to furnish the above information on grounds that "All of the information requested from Metta concerning the names of current employees, individual wage rates, their dates of employment, their status as journeyman or apprentice could have easily been obtained from the employees directly if any attempt had been made to contact the employees." (Original emphasis.) It is well settled (and held by the Judge and Board in the previous case) that the mere fact that requested information could be obtained elsewhere does not excuse the employer from its obligations. *Holyoke Water Power Co.,* 273 NLRB 1369 (1985). Since all the information requested by the Union set forth in paragraphs 6, 7, and 8 of the complaint is clearly material and necessary for the Union to bargain, I conclude that the Respondent violated Section 8(a)(5) by refusing to furnish the information in a timely fashion. It is noted that when the Respondent did finally agree to meet with the Union in February 2005, it did submit some of the requested information, such as the names of employees; however, the information was not in a form that was complete (no inclusive dates of employment, wage rates, or apprentice status) or very useful. Thus even submitting some information, I conclude that in general, the Respondent ignored the information requests and delayed furnishing the information. The Respondent thereby violated Section 8(a)(5) of Act.

The Respondent further defends its refusal to furnish the requested information on grounds that the Union engaged in surface bargaining, did even attempt to contact the replacement employees, attempted to force the Respondent to accept the association as its bargaining agent and when the Respondent refused, made a proposal substantially more onerous. On brief, Counsel for the Respondent concluded, "Since Local 1's actions are in bad faith, Metta is released from any obligation to supply the additional information requested by Local 1." I reject this defense. Although the Union's tactics are in some respects questionable, there is no allegation that it bargained in bad faith or had a mind set not to reach an agreement. Further, the Respondent offered no evidence to prove its assertion that the Union's request for information was for the purpose of harming the Respondent. *Grinnell Fire Protection Systems Co.,* 332 NLRB 1257.

Finally, the Respondent does not contest the materiality of the requested information or argue any kind of privilege (e.g. confidentially of employee personal files) which would relieve it of the duty to furnish the information.

2. Bargaining

It is alleged in paragraph 9 of the complaint that by letters dated April 26 and May 10, 2004, the Union requested the Respondent meet with its representatives for the purpose of collective bargaining and that the Respondent refused to do so until February 1, 2005. It is also alleged that the Respondent breached its bargaining obligations by "insisting on bargaining by telephone rather than face-to-face," failing to meet at reasonable times and "insisting the Union submit written concessions by mail prior to any further negotiations," and by failing to meet since April 7, 2005.

No doubt that following the Eight Circuit's enforcement of the Board's order in the first case the Respondent refused to bargain. Counsel so stated in a letter to the Regional Office and in a letter to litigation division. However, the parties did subsequently meet on three occasions in 2005 and it is fair to say they were substantially apart on what would be an acceptable agreement. The Respondent contends the parties were at impasse. Palazzolo testified that everything was negotiable, notwithstanding that the Union's latest proposal, deleting NECA as the bargaining agent for the Respondent was substantially more onerous than the area contract.

The parties last met on March 25, following which, by letter of March 29, Palazzolo suggested to Kaplan that the parties meet on April 8 and any morning during the weeks of April 11 and 15. Kaplan replied on March 29, listing 27 ways in which the Union's last proposal had differed from the area contract and were more onerous. Palazzolo responded on March 30, stating, "We are not going to bargain by letter. We have given you dates we would be available. Please advise as to which date

will work for Metta." Kaplan wrote on March 30, in part, "Because of time constraints and the cost of negotiations, Metta proposes that the parties negotiate by telephone as is done in many negotiations. Please contact the undersigned with available times and dates and I will arrange to have (the Respondent's owner) available to conference in." By return letter, Palazzolo wrote, "The Union, respectfully, declines your request to bargain by phone. * * * Local One's last contract proposal was geared to Metta's request for their own agreement. The Union is ready to hear Metta's counter-proposal and is prepared to bargain." Kaplan responded on April 1: "I am in receipt of your letter of this date. We have offered to bargain by telephone. As per my letter of March 31, 2005. Please contact the undersigned with your availability. This will be my last letter regarding the methods of bargaining." Palazzolo wrote back on April 6 that the Union "wants to meet face-to-face" and that the Union was ready to consider any counter proposal by the Respondent. On April 7 Kaplan wrote that the Union's proposal since 2000 had only been to increase the terms and Respondent had nothing new to propose, but if the Union did, "please send it to the undersigned and we will schedule a meeting to discuss it. If you don't have something new to propose to Metta, I must assume that the parties are at impasse." In the final letter of this series, Palazzolo said the parties were not at impasse and "We need, however, to meet in person to talk over a contract and not bargain via telephone or by sending new proposals through the mail."

From the beginning of this dispute, the Respondent's approach to its obligations under the Act has been one of delay, and outright refusal, particularly following the Eight Circuit's enforcement of the Board order to bargain in good faith. In fact, it is fair to conclude that the Respondent finally agreed to meet only after the Board filed a petition for civil contempt. The parties then had three meetings, then Counsel for the Respondent then suggested that they bargain over the phone. The General Counsel argues that by this statement Kaplan was refusing to negotiate further except by telephone. I disagree. In his letter a few days later, after Palazzolo said the Union wanted to meet face-to-face, stated his willingness to "schedule a meeting" to discuss any additional proposals by the Union.

Although demanding that the parties negotiate by phone is at odds with Section 8(d) and is unlawful, *Alle Arecibo Corp.,* 264 NLRB 1267 (1982), the mere suggestion that they do so is not. That is, the parties can mutually agree to negotiate by phone, or, indeed, agree to any other nonmandatory subject of bargaining. On balance, I cannot conclude that Kaplan made more than a suggestion and such is not an unfair labor practice.

In the same letter in which Kaplan said he would schedule a meeting, he also wrote that if the Union had anything new to propose "please send it to the undersigned. . . ." This is alleged to have been violative of Section 8(a)(5) as a demand to bargain to bargain by mail, *Beverly Farm Foundation,* 323 NLRB 787 (1997). It would not seem unreasonable or unlawful for one party to collective bargaining to suggest to the other that a proposal be mailed in advance of meeting, particularly since collective-bargaining agreements are complex and require some time to study. Thus, I believe, the issue here is whether Kaplan's suggestion was really an unlawful demand that the parties negotiate by mail, or whether it was suggestion to expedite the process when the parties should meet. Notwithstanding the Respondent's actions in refusing to bargain, I do not conclude that Kaplan made an unlawful demand to bargain by mail.

I conclude that the Respondent unlawfully delayed in meeting with the Union and since the final meeting on March 25, has refused to meet and bargain with the Union. Counsel for the Respondent suggested to the Union and argues here that the parties are at impasse, which presumably excuses his refusal to meet with union representatives. Although the Respondent rejected the Union's last proposal (and indeed many of the provisions therein are more onerous than previous proposals) such does not imply impasse. The Respondent did not suggest any particular issue on which the parties were in adamant disagreement, and the Union has stood willing to bargain on all issues. And they only had three meetings. On these facts it can scarcely be concluded that there was an impasse excusing the Respondent from meeting at reasonable times. See *Taft Broadcasting Co*., 163 NLRB 475 (1967). Beyond the lack of impasse, there was no justification for the Respondent's 9-month period of adamant refusal to begin meeting.

It is well settled that neither party to collective-bargaining negotiations must agree to any particular proposal. The Act requires only that they bargain in good faith which means, among other things, that they have a good faith intent to reach an agreement. However, collective bargaining is not a technical exercise. Rather, it is the process by which parties can mutually agree to the wages, hours, and other terms and conditions of employment. The duty to bargain includes the duty for an employer to furnish, on request, all information necessary and material for the union's use in representing employees. The duty further includes meeting at reasonable times and places. Here, following the initial unfair labor practice litigation, the Respondent stated that it would not bargain with the Union. And it is clear from the sequence of events that the Respondent would never have done so absent the Board's petition for contempt in the Eight Circuit. The fact that the Eight Circuit denied the petition for a contempt citation does vindicate the Respondent's stated refusal to bargain for some 9 months. Nor does it justify the Respondent's refusal to furnish necessary and material information. In short, by its actions the Respondent has demonstrated a distain for its obligations under the Act and has again raised the defense that the Union does not really seek a contract, a defense which was summarily rejected in the first litigation.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, including its refusal to meet and bargain with the Union as the representative of its employees and its refusal to furnish in a timely manner complete information requested by the Union which I find was necessary and material to the Union's representation, I shall recommend that the Respondent be ordered to meet on request and bargain with the Union and if an agreement is reached, embody same in a written executed contract. I shall also recommend that the Respondent be ordered to furnish all information requested by Union that has not previously been furnished and to update such information as it

did furnish.

In addition to the above traditional remedy, the General Counsel argues that the remedy should include litigation costs, including attorney's fees, for the Board and the Union; that the highest ranking official (or an agent of the Board) read the attached notice to employees; a broad cease-and-desist order and a 12-month extension of the Union's certification year.

Although the Board has generally held with the American Rule that litigation costs should not be awarded where the defenses are "debatable" (usually turning on credibility), where the defenses are "frivolous" then such an award is justified. *Alwin Manufacturing Co.,* 326 NLRB 646 (1998). Thus the issue is whether the Respondent's defense to this litigation—specifically that the Union does not intend to bargain a separate contract—is "debatable."

I conclude it is, notwithstanding that the essentially same defense was raised, and rejected, in the first case. I note that in the previous litigation, the issues primarily involved Section 8(a)(1) and (3), with the only 8(a)(5) issue being the Respondent's refusal to furnish the names and addresses (and other data) of its replacement employees.

It was after the Eight Circuit's decision that the Respondent stated its intent not to bargain and why. When the parties did meet, the Union presented its proposal, which was the area agreement. In this, the Union sought to have the Respondent designate the association as its bargaining agent (a clearly nonmandatory subject of bargaining). The area agreement also contained a "Favored Nations" clause, from which the Respondent could at least debatably conclude that the Union would not agree to more favorable terms for the Respondent regardless of the Respondent's particular circumstances. These factors do not excuse the Respondent's unlawful activity found above. They do, however, make the Respondent's defense "debatable." Therefore, an award of costs is not appropriate.

The Board has held that and award of litigation expenses is also appropriate where the unfair labor practice is "flagrant, aggravated, persistent and pervasive." *Cogburn Healthcare Center,* 335 NLRB 1397 (2001). The Respondent's refusal to bargain with the Union following the decision of the Eighth Circuit, and its delay and refusal to furnish necessary information, are flagrant, but I conclude not sufficiently outside the mainstream of refusal-to-bargain violations to justify the imposition of costs.

Where the violations of the Act are numerous and serious, the Board has held that the Respondent be ordered to read the notice to employees (or at its option, have an agent of Board do so). *Blockbuster Pavillion, 331* NLRB 1274 (2000). Again, I do not find the violations sufficiently extraordinary to warrant this extraordinary remedy.

A broad cease and desist order is standard where the respondent has shown a proclivity to violate the Act. *Hickmott Foods,* 242 NLRB 1357 (1979). Since this is the second case against the Respondent such a broad order is appropriate.

Finally, the General Counsel argues that the Union's certification be extended another year, citing *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962). Although the Union's strength has probably been dissipated as a result of the Respondent's unfair labor practices and the strike, the Union nevertheless should be given a reasonable opportunity to bargain for the current employees. *Van Dorn Plastic Machinery Co.,* 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6th Cir. 1991). The Board has therefore held that the remedy for an employer's refusal to bargain unfair labor practices "to assure at least a year of good-faith bargaining include an extension of the certification year." *Northwest Graphics, Inc.,* 342 NLRB 1288, 1289 (2004). The Board recognized that the length of such an extension depends on a number of factors, such as the bargaining history. Here, there is no significant bargaining history. Thus an extension of 12 months is appropriate.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, JHP & Associates, LLC d/b/a Metta Electric, its officers, agents, successors and assigns, shall

1. Cease and desist from

a. Refusing to bargain collectively and in good faith with the Union concerning wages, hours, and others terms and conditions of employment.

b. Refusing to furnish the Union information necessary and material to collective bargaining.

c. In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of all employees in the below described bargaining unit concerning wages, hours, and other terms and conditions of employment and if an agreement is reached, embody that agreement in a signed contract, the Union certification to be extended 1 year from the date the Respondent complies with this Order. The appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act is:

> All journeymen and apprentice electricians employed by the Respondent from its St. Charles, Missouri facility, EXCLUDING all office clerical and professional employees, guards and supervisors as defined in the Act.

b. Provide the Union with information it requests that is necessary for it to bargain collectively as the representative of the employees in the above-described unit, including the information requested in letters dated April 26, 2004, May 10, 2004, January 12, 2005, February 3, 2005, and February 28, 2005.

c. Within 14 days after service by the Region, post at each of its facilities copies of the attached notice marked "Appendix."[4]

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[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees of the Respondent at any time since March 15, 2000.

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, San Francisco, California, July 13, 2005.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively and in good faith with the Union concerning wages, hours, and other terms and conditions of employment for employees in the bargaining unit found appropriate.

WE WILL NOT refuse to furnish the Union information necessary and material to collective bargaining.

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL bargain in good faith with the Union and if an agreement is reached, put it in an executed contract.

WE WILL furnish information requested by the Union which is necessary for the Union to bargain on behalf of our employees.

JHP & ASSOCIATES, LLC D/B/A METTA ELECTRIC

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."